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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor of the State of South Carolina; DOUGLAS E. BRYANT, Commissioner of the South Carolina Department of Health and Environmental Control; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,
Petitioners,

v.

EVIRONMENTAL TECHNOLOGY COUNCIL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

In its brief as *amicus curiae*,[1] the United States acknowledges that the question presented in this case is one of

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[1] On March 17, 1997, this Court entered an order inviting the Solicitor General to file a brief in this case expressing the views of the United States. Page proofs of the United States' brief were filed with the Court on May 30, 1997, and served on the parties by mail on that day. This supplemental brief is filed pursuant to Supreme Court Rule 15.8.

statutory construction: whether the Resource Conservation and Recovery Act ("RCRA") and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") have created federal standards applicable to South Carolina's hazardous waste program that operate in place of those of the dormant Commerce Clause. But the government sidesteps the circumstances of South Carolina's program that bear on that statutory question, using three separate pathways to that end. Each is unavailing. First, the United States avers that the Environmental Protection Agency ("EPA") "has not specifically addressed or approved any of the South Carolina provisions" under RCRA. Gov't Br. at 12. In fact, however, EPA acted in 1995 to approve modifications to South Carolina's program in express reliance on one of the provisions, *id.* at 13-14, and each of the provisions is included in South Carolina's approved program and thus would operate in lieu of the federal program absent the injunction at issue here. Second, the United States suggests that EPA would not apply the RCRA commerce standard in a manner which varies from dormant Commerce Clause criteria. *Id.* at 15-16. In actuality, EPA did just that regarding South Carolina's program in 1985, and it has done so with other State's programs as well. *Id.*, at 5 n.2 and 6 & n.3 (South Carolina's program and Maine's program). Third, the United States advises that referral to EPA under the primary jurisdiction doctrine is not appropriate to address "questions of constitutional law." *Id.* at 19. However, the statutory and regulatory issues must be resolved as a first step, to determine whether any constitutional issues arise. These issues of statutory and regulatory interpretation and application are what would be referred. Pet. at 28-29, Pet. Reply at 8-9.

The United States' diversions constitute analytical dead ends. At the end of the maze constructed by the government, an important constitutional question remains. Under the Fourth Circuit's ruling, South Carolina laws at issue could be *valid* under RCRA, but *invalid* by operation of

the dormant Commerce Clause, at the same time. This Court has previously acknowledged the potential impact of RCRA to displace dormant Commerce Clause analysis. *Chemical Waste Mgmt. v. Hunt*, 504 U.S. 334, 346 n.9 (1992); *see also C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 409-410 (1994) (O'Connor, J., concurring). The question is substantial and recurring, is now squarely presented, and warrants this Court's review.

I. THIS CASE SQUARELY PRESENTS THE QUESTION WHETHER THE DORMANT COMMERCE CLAUSE APPLIES TO A STATE HAZARDOUS WASTE REGULATORY PROGRAM APPROVED BY EPA UNDER RCRA

Section 3006 of RCRA provides that a State hazardous waste program must be "consistent with the . . . State programs applicable in other states" in order to receive RCRA approval, and that upon EPA's approval a State is "authorized to carry out such program in lieu of the Federal program." 42 U.S.C. § 6926(b).[2] South Carolina operates an approved RCRA program: the State initially received approval in 1985 (Pet. 6), and since that time its program has operated "in lieu of" federal law. The elements of South Carolina's program challenged here were added in 1989 and 1990, were submitted to EPA in connection with the State's biannual reports of changes to its program, and are part and parcel of the approved pro-

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[2] If a State submits for approval a hazardous waste regulatory program that satisfies the "consistency" requirements of Section 3006 of RCRA, 42 U.S.C. § 6926, EPA must approve that program. There is an implication in the United States' brief that EPA has discretion in the matter (*see* Gov't Br. at 4, commenting that "EPA may authorize a State . . ."), but the statute specifies that "[s]uch State is authorized to carry out such program in lieu of the Federal program . . . unless [specific findings are made]." 42 U.S.C. § 6926(b). There is no discretion. See 53 Fed. Reg. 16,264, 16,265 (May 6, 1988) (bottom portion of middle column) (EPA's comments on approving Maine's program).

gram.[3] The United States does not controvert that South Carolina duly advised EPA of the provisions at issue, or that the provisions are part of the State's program, or that EPA has acted on modifications to South Carolina's program in light of the provisions.

EPA in 1995 approved numerous changes to South Carolina's program that illustrate these facts. 60 Fed. Reg. 42,046 (Aug. 15, 1995). These changes came about because of the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), Pub. L. No. 98-616, 98 Stat. 3221 (Nov. 8, 1984), which called for a significant revamping of State RCRA programs. EPA developed a checklist for purposes of HSWA that identified as "clusters" each of the changes that were contemplated by that amendment to RCRA. After the enactment of HSWA, but before approval of South Carolina's HSWA modifications in 1995, the regulatory authority over hazardous waste had been split. South Carolina's basic program operated in lieu of federal law, but the HSWA requirements were implemented by EPA. *See* 42 U.S.C. § 6926(c)(4).[4] One of the statutes involved in

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[3] The challenged provisions which the United States refers to as "blacklisting" laws, Gov't Br. 3, were in fact a considered attempt by the State to assure that South Carolina had adequate capacity "within the State or outside the State in accordance with an interstate agreement" for wastes "expected to be generated within the State"—assurances that appear on their face to be contemplated by Section 104(c)(9) of CERCLA, 42 U.S.C. § 9604(c)(9), Pet. App. 108a, as a necessary precondition for the State to remain eligible for federal remedial actions under CERCLA.

By contrast, *Chemical Waste Mgmt., Inc. v. Templet*, 967 F.2d 1058 (5th Cir. 1992), dealt summarily with restrictions in Louisiana law on disposal of foreign-derived waste within that State. The provisions of CERCLA thus had no bearing on *Templet*, and as to RCRA the Fifth Circuit relied entirely on the Fourth Circuit's 1991 decision at Pet. App. 50a-79a.

[4] This portion of the statute provides:

(4) In the case of a State permit program for any State which is authorized under subsection (b) of this section or under this

this case, S.C. Code Ann. § 44-56-60, is the State's basic permitting authority. In EPA's action in 1995, it was cited a number of times as authority for South Carolina's HSWA clusters approved by EPA. Moreover, subsection (a) of that Section codifies South Carolina's restrictions on total landfilling of hazardous waste, enacted in Act No. 590 of 1990. *See* Pet. 8. As noted previously, Pet. Reply at 5 & n.3, EPA expressly relied on Section 44-56-60(a) several times in approving the State's program revisions to implement HSWA. And, EPA could not have taken its 1995 action lightly because approval of the State's HSWA changes meant they displaced the correlative federal HSWA provisions.

It is true that EPA in 1995 did not indicate it analyzed S.C. Code Ann. § 44-56-60(a) or the other challenged provisions to determine whether they "unreasonably" affected interstate commerce within the meaning of its "consistency" regulation, 40 C.F.R. § 271.4(a). But, it is also true that EPA extended its approval of South Carolina's program, citing challenged provisions as authority, and those provisions are part of South Carolina's program. Thus, the United States' assertion that "EPA has not expressly approved any of these challenged provisions," Gov't Br. at 13; *see also id.* at 7, 8, 12, 14, and 15, rests on a distinction so fine as to be imperceptible. The authorization created by RCRA Section 3006 is addressed to the State's *program*. South Carolina operates an approved state program, "in lieu of the Federal program." It obtained the required statutory approval in 1985, has at all times kept EPA apprised of the changes in and

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subsection, until such program is amended to reflect the amendments made by the Hazardous and Solid Waste Amendments of 1984 and such program amendments receive interim or final authorization, the Administrator shall have the authority in such State to issue or deny permits or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984. The Administrator shall coordinate with States the procedures for issuing such permits.

additions to its program, has never had approval withdrawn, and has in fact had the approval extended while this case has been pending (including with respect to one of the laws being challenged). Under RCRA, the South Carolina laws at issue here would, absent the district court's injunction, operate in lieu of federal law.

In this context, a dormant Commerce Clause challenge to any part of the State's program should not proceed unless the permissibility of the challenged provisions under the RCRA standard for state regulation of commerce is addressed *first*. If the RCRA standard permits South Carolina to do what it has done, the *dormant* Commerce Clause challenge should be displaced. It is a patent dodge for the United States to assert that the question of whether "the regulatory 'consistency' standard should affect judicial scrutiny of [each] provision under the dormant Commerce Clause is not properly presented." Gov't Br. at 14. South Carolina's approved RCRA program has been struck down by a permanent injunction based on the dormant Commerce Clause. Before reaching such a result, the effect of the RCRA commerce standard on such a challenge not only can, but logically *must*, be considered.

Thus, the Fourth Circuit correctly saw the need to confront the RCRA issue. Its error was in the result of that confrontation, and in its holding on the merits that no application of the RCRA consistency standard could save any of the challenged provisions, because "we must apply the Constitution's dictates." Pet. App. 15a. The State's petition seeks a decision on the statutory question. The Fourth Circuit's error is properly before this Court.

II. AS ADMINISTERED BY EPA, RCRA CREATES A STANDARD DISTINCTLY DIFFERENT FROM THE DORMANT COMMERCE CLAUSE

The United States acknowledges that in enacting RCRA's requirement that a State program be "consistent with the . . . State programs applicable in other States," Congress intended to address the permissible effects of

state hazardous waste laws on interstate commerce. Gov't Br. at 15-16. Such intent is confirmed in the legislative history of RCRA. *See* Pet. at 17. In the United States' view, however, "the most natural interpretation of RCRA's requirement that state programs be consistent" is that it merely restates the existing dormant Commerce Clause restrictions. Gov't Br. at 16. By urging an interpretation that results in no conflict between RCRA and the dormant Commerce Clause, the United States seeks to assume away the issues in this case. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 373 (1994).

But EPA has not interpreted RCRA in this way, and it is EPA's view of the statute that matters. *Cf. Meghrig v. KFC Western Inc.*, 116 S. Ct. 1251, 1254 (1996) ("Chief responsibility for the implementation and enforcement of RCRA rests with [EPA] . . . ."); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). EPA has determined that RCRA creates a more permissive standard than would apply under the dormant Commerce Clause. Thus, EPA's regulation governing "consistency" uses terms distinct from those applicable under the dormant Commerce Clause, and permits state restrictions which do not "unreasonably restric[t], imped[e], or operat[e] as a ban on the free movement across the State border of hazardous waste." 40 C.F.R. § 271.4(a). There is no doubt about this interpretation; EPA has determined that some State programs that would surely violate the dormant Commerce Clause are nonetheless valid under Section 271.4(a). One example comes from South Carolina's own program, Pet. at 6 n.1, Pet. Reply at 2-3, and another is an example cited by the United States of EPA's approval of Maine's program. Gov't Br. at 5 n.2 (citing 53 Fed. Reg. 16,264, 16,265 (1988) (EPA approval of disposal fee structure imposing double fees on waste derived from outside the State)).[5]

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[5] The United States correctly notes that in allowing what the dormant Commerce Clause would prohibit, EPA "does not purport

In this context, an *amicus* brief from the United States asserting that Section 271.4(a) and the dormant Commerce Clause create the same standard, Gov't Br. at 16, does not supplant EPA's considered application of the statute it administers. *See Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 988 (1st Cir. 1995); Pet. Reply at 9-10 & n.8; *see also Northwest Airlines*, 510 U.S. at 366-67. If EPA were permitted to exercise its primary jurisdiction, an assessment of ETC's challenge under the RCRA commerce standard could produce a result different from that which has been reached, erroneously, under the dormant Commerce Clause.

III. THE STATE'S PROGRAM CANNOT BE APPROVED AND VALID UNDER RCRA AND YET BE STRICKEN DOWN UNDER THE DORMANT COMMERCE CLAUSE

In contrast to the United States' views as *amicus*, the Court of Appeals refused to address, or to allow EPA to address, whether Section 271.4(a) created a standard different from that of the dormant Commerce Clause, because the Fourth Circuit decided that *no* application of the consistency rule could affect the dormant Commerce Clause. That decision failed to give effect to this Court's precedents under the dormant Commerce Clause.

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to adjudicate constitutional questions under the dormant Commerce Clause." Gov't Br. at 16. South Carolina has never suggested that EPA should do so. Only a court has jurisdiction to conclude that the RCRA statutory standard displaces the dormant Commerce Clause. But at the same time, the dormant Commerce Clause cannot apply to matters governed by federal statute. Thus it must be determined that the challenged provisions are not "consistent" under RCRA (as implemented in Section 271.4(a)) before any dormant Commerce Clause challenge can properly go forward. That determination conceptually involves a ruling on the interpretation of RCRA and on EPA's implementing regulation, both of which could be accomplished by this Court, *see supra*, p. 6, and on an application of the statutory standards to South Carolina's program, which should be addressed by EPA on referral under the primary jurisdiction doctrine.

Once federal law has authorized a State's actions, the dormant Commerce Clause does not independently restrict them. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). And authorization may stem directly from Congress, or from valid actions of federal agencies. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 215 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 156 (1982).

As applied by EPA, RCRA creates a more permissive rule respecting effects of state hazardous waste regulatory programs on interstate commerce than does the dormant Commerce Clause. To that extent, it is "unmistakably clear" that the more restrictive criteria of the dormant Commerce Clause have been displaced. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984). Seeing its laws permanently struck down, South Carolina requests that this Court grant review and consider the Fourth Circuit's grounds for that action.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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